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LETTER DATED 31 MARCH 1993 FROM THE CHARGE D'AFFAIRES A.I.
OF THE PERMANENT MISSION OF CANADA TO THE UNITED NATIONS
ADDRESSED TO THE SECRETARY-GENERAL

I enclose a copy of the Report of the International Meeting of Experts on the Establishment of an International Criminal Tribunal and the Chairman's Conclusions. This meeting, sponsored by Canada, was held in Vancouver, B.C., from 22 to 26 March.

Canada hopes that this detailed Report and the Chairman's Conclusions will assist you in preparing the report on the international tribunal requested by Security Council resolution 808.

I should be grateful if you would have this letter and the enclosed documents circulated as a document of the Security Council.

(Signed) David MALONE
Ambassador and
Chargé d'affaires a.i.

Annex

INTERNATIONAL MEETING OF EXPERTS ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL TRIBUNAL

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Organized by the

International Centre for Criminal Law Reform and Criminal Justice Policy

at Vancouver, Canada

March 22-26, 1993

REPORT

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INTERNATIONAL MEETING OF EXPERTS ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL TRIBUNAL

Vancouver, British Columbia (Canada), March 22-26, 1993

TABLE OF CONTENTS

	Page
INTRODUCTION	5
OVERVIEW	6
A. SOURCE UNDER INTERNATIONAL LAW FROM WHICH THE *AD HOC* TRIBUNAL OR PERMANENT COURT COULD DERIVE ITS EXISTENCE AND POWERS	8
B. JURISDICTION	10
Acceptance by a state of the jurisdiction of the international tribunal or court	10
Jurisdiction of the international tribunal or court versus that of national courts	12
Conditions under which prosecutions may be brought before the international tribunal or court	14
Jurisdiction *ratione personae*	14
Jurisdiction *ratione materae*	15
C. APPLICABLE LAW	16
D. STRUCTURE OF AN *AD HOC* TRIBUNAL OR PERMANENT COURT	18
Composition of the international tribunal or court	19
Election of members of the international tribunal or court	19
Review process	20

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INTERNATIONAL MEETING OF EXPERTS ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL TRIBUNAL

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TABLE OF CONTENTS

		Page
E.	PRE-TRIAL AND TRIAL PROCEDURES	20
	Bringing the accused to trial	20
	Investigation of crimes with mutual assistance in criminal matters	22
	Investigation of crimes where mutual assistance in criminal matters is not possible	23
	Evidence	25
	Rights of the accused	26
	Procedural Rules	26
	Role of victims	28
F.	ENFORCEMENT OF SANCTIONS	28
	The range of sanctions	29
	Method(s) of enforcement of sanctions	30
CHAIRMAN'S CONCLUSIONS		33

INTERNATIONAL MEETING OF EXPERTS ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL TRIBUNAL

Vancouver, British Columbia (Canada), March 22-26, 1993

REPORT

INTRODUCTION

The International Meeting of Experts on the Establishment of an International Criminal Tribunal was held in Vancouver, British Columbia (Canada), on March 22-26, 1993. Participants in the meeting were experts attending in their personal capacity from 28 countries, experts from relevant intergovernmental and non-governmental organizations and academics. The meeting was hosted by the International Centre for Criminal Law Reform and Criminal Justice Policy, which is associated with the United Nations crime prevention and criminal justice programme. The International Centre exists as a result of a joint initiative of the Society for the Reform of Criminal Law, the University of British Columbia and Simon Fraser University. Financial and organizational support for the meeting was provided by the Canadian Departments of External Affairs and of Justice as well as by the Canadian International Development Agency. Meetings were held in plenary sessions and working group sessions, which reported back to the plenary sessions. Documents available to participants included the Report of the International Law Commission on the work of its forty-fourth session (1992), the draft instruments on an international tribunal (M. Cherif Bassiouni (1992)), and the reports of the Rapporteurs under the Commission on Security and Cooperation in Europe (CSCE) Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia, the French Commission and the Italian Commission, resolution 808 of the Security Council of 22 February 1993 as well as papers prepared for the meeting which were designed to be the focus of the working groups.

At the outset of the meeting, participants were informed that the nature of the meeting had changed: what had originally been intended to be a discussion of the longer term aim of the establishment of a permanent international criminal court had to some extent been refocussed by recent international events, in particular, by the adoption of resolution 808 by the Security Council. This resolution decided "that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991". The resolution also requested the Secretary-General to submit for consideration by the Council, if possible no later than 60 days after the adoption of the resolution, a report on all aspects of this matter, including specific proposals and, where appropriate, options for the effective and expeditious implementation of the decision to establish the tribunal. Accordingly, the meeting considered both the short-term issue of the creation of an

ad hoc tribunal to deal with crimes committed in former Yugoslavia and the longer term aim of the establishment of a permanent court.

The Chairman indicated that he intended to forward the report of this meeting to the Secretary-General in order to assist him in preparing his response to the Security Council as mandated by resolution 808. The report of the meeting will also be transmitted to the United Nations Commission on Crime Prevention and Criminal Justice, for its meeting in April 1993, to assist it in forming views on practical criminal law aspects to be forwarded to the International Law Commission, as well as to the International Law Commission for its 1993 annual session.

Welcome addresses were made by Vincent Del Buono, President of the International Centre and the Honourable Allan McEachern, Chief Justice of British Columbia. The key-note address was delivered by the Honourable Barbara McDougall, Secretary of State for External Affairs, and International Trade Canada who was introduced by Dr. William Leiss, Chair, Board of Directors of the International Centre and Vice-President, Research, Simon Fraser University. Mrs. McDougall was thanked by Professor M. Cherif Bassiouni, Professor of Law, DePaul University College of Law, President, International Association of Penal Law and President, International Institute of Higher Studies in Criminal Sciences.

Following a general overview of how the concept of establishing an international criminal court had evolved over the years, and, more particularly, how the idea of establishing an international tribunal to try persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia had steadily gained momentum during the last year, Mrs. McDougall emphasized that it is important for the general public to understand the international principles of humanitarian law that guide international action towards the establishment of such a tribunal. She exhorted the meeting not to forget that the urgency of establishing an *ad hoc* tribunal to address the situation in the former Yugoslavia should not detract from the longer term goal of establishing a permanent criminal court. According to her, it is essential that states consider concrete measures to ensure that the tribunal has the financial and human resources necessary to function. She hoped that this meeting would move all parties involved in discussions surrounding this issue closer to a consensus. Thus, while the purpose of the meeting would be to find ways in which this could be done most efficiently, her task would be to convey these ideas to her colleagues at the national and international levels in order that there be support at the political level for the development of a fundamental moral vision of the future.

OVERVIEW

Similarities and differences between an *ad hoc* tribunal and a permanent court

The links between these two bodies were discussed. Some believed that the establishment of an *ad hoc* tribunal would be a stepping stone towards the creation

of a a permanent court, while others felt that it might delay the establishment of the latter if the international community were to await the results of the work of an *ad hoc* tribunal. The general view was that the work could be carried out in parallel.

The point was also made that the questions to be resolved in establishing an *ad hoc* tribunal under the authority of the Security Council were very different from the questions to be resolved in establishing a widely supported treaty-based permanent court.

For these reasons, it would be unwise to approach the issue of the establishment of an *ad hoc* tribunal on the basis that it should necessarily create a precedent for the establishment of a permanent court.

One of the difficulties with establishing either an *ad hoc* tribunal or a permanent court would be to find a single approach which would take into account the different existing legal systems in a manner which would attract broad support of member states. This difficulty was reflected in the drafts concerning the *ad hoc* tribunal, which, in some points, tended to reflect the legal background of the respective authors. However, the experience of existing regional and international courts had demonstrated that judges drawn from different legal systems and cultures were able to develop common legal standards.

Similarly, if the *ad hoc* tribunal was to operate within the framework of the CSCE, the rapporteurs under the CSCE Moscow Human Dimension Mechanism believe that the only lawful way to proceed would be by way of treaty or convention, as the CSCE does not possess powers similar to those of the Security Council. This again was reflected in the way its recommendations were couched.

In any event, the following issues would have to be addressed before an *ad hoc* tribunal or permanent court could be established:

A) Source under international law from which the *ad hoc* tribunal or permanent court could derive its existence and powers

B) Jurisdiction (including acceptance by a state of the jurisdiction of the international tribunal or court, jurisdiction of the tribunal or court versus that of national courts, conditions under which prosecutions may be brought before the international tribunal or court, jurisdiction *ratione personae* and jurisdiction *ratione materiae*)

C) Applicable law (including the defintion of crime, general principles of liability and defence and protection of the accused)

D) Structure of an *ad hoc* tribunal or permanent court (including composition, election of members and review process)

E) Pre-trial and trial procedures (including transfer of the accused to the jurisdiction of the tribunal or court and mutual assistance mechanisms, investigation of crimes where mutual assistance in

criminal matters is not possible, evidence, rights of the accused and bringing the accused to trial)

F) Enforcement of sanctions

A. SOURCE UNDER INTERNATIONAL LAW FROM WHICH THE *AD HOC* TRIBUNAL OR PERMANENT COURT COULD DERIVE ITS EXISTENCE AND POWERS

A number of factors must be taken into account. These include the need for acceptance by the international community, the principle of legality and the need for a perception of legitimacy, including the need to ensure impartial treatment of offenders. Celerity and certainty should also be taken into account, particularly with respect to the *ad hoc* tribunal, but not at the expense of the foregoing factors. There is an important question in relation to the permanent court of whether a later act of acceptance of jurisdiction should be required once the court is established. This additional procedure could also permit non-parties to accept the jurisdiction of the court on a temporary or *ad hoc* basis. The possibility of creating a more permanent tribunal which would remain dormant until revived by a resolution of the Security Council to meet emergent threats to peace and security was also adverted to.

(i) *Ad hoc* tribunal

Most participants believed that there is authority, under chapter VII of the Charter of the United Nations (more particularly, article 41), for the Security Council to adopt a resolution to create an *ad hoc* tribunal to deal with complaints of serious violations of international humanitarian law, war crimes and crimes against humanity arising from the situation in former Yugoslavia. A few expressed the view that the creation of an *ad hoc* tribunal was not a "measure" within the meaning of article 41.

The suggestion was made that, in order to attract and express global support for this resolution, the General Assembly, representing all member states of the United Nations, might adopt a resolution in support of the creation of the *ad hoc* tribunal, yet respecting the exclusive powers of the Security Council under chapter VII of the Charter, and in particular the provisions of article 12 of the Charter.

In relation to the proposed *ad hoc* tribunal the principal source in determining its powers and jurisdiction is by reference to the terms of the Security Council resolution. (It was recognised that domestic legislation and treaty action may be necessary on the part of United Nations member states to enable them to give effect to their obligations arising from the Security Council resolution.)

On the question of the constitutive instrument in respect of the *ad hoc* tribunal it was accepted that the jurisdiction would be conferred over certain

offences committed in the territory of the former Yugoslavia in the period in question as defined in Security Council resolution 808, but there were divergent views as to the particularity with which these offences should be described. In particular, concern was expressed that the resolution or "statute" contained in the resolution should not refer to offences by reference to Conventions *en bloc*, as these often define offences in abstract terms capable of different interpretation in different legal systems. It was proposed that the relevant prohibited conduct should be defined with precision. This question was further considered in the context of the applicable law for any tribunal or court.

A question on which agreement was not reached was whether the Security Council resolution establishing the *ad hoc* tribunal should seek to categorize the conflict in the territory of former Yugoslavia as an international conflict since grave breaches of humanitarian law, as distinct from crimes against humanity, exist only in international conflicts. One school of thought was that the instrument should do so in a manner binding on the *ad hoc* tribunal while the other school would leave this as a matter to be determined on an *ad hoc* basis by the tribunal, notwithstanding the additional difficulties for the prosecution that this would entail.

(ii) Permanent court

There was near unanimity that the constitutive instrument of a permanent court must be a treaty. The question of establishing the court through an amendment to the Charter of the United Nations was also raised, but the general conclusion was that this would be too time-consuming and would present unnecessary difficulties.

Several distinctions were identified to the jurisdiction of an *ad hoc* tribunal and that of a permanent court, including the need to determine the relationship of the jurisdiction to that of national courts. This is dealt with later in the report.

There was considerable debate as to whether the jurisdiction would flow directly from the statute or whether, as in the case of the International Court of Justice, there should be a distinct additional acceptance by states parties of the jurisdiction in respect of some or all of the offences identified in the statute. There was also discussion relating to what, if any, role should be left for the Security Council in triggering the jurisdiction of the court. Many expressed the view that a role for the Security Council might be harmful to the standing, and hence acceptance, of the court. An ongoing Security Council role might cause the permanent court to come to be regarded as a series of *ad hoc* tribunals operating only when "triggered". According to this view, the Security Council role, if any, should not form a systematic part of the statute. Most thought an ongoing role for the Security Council in relation to the permanent court, particularly as to when and over what it was to exercise its jurisdiction, was undesirable.

On the presumption that any jurisdiction of the court would be concurrent with that of national courts, the question of the necessity of consent of states to the exercise of the court's jurisdiction was discussed.

In this context one clearly relevant state is the state with actual custody of the accused. If that state was to be required to transfer the accused to an international court, this would have to be provided for in the statute and might be subjected to other international obligations of that state, especially *vis-a-vis* states not party to the statute. Another relevant state was that on whose territory the offence was committed. Different views were expressed on the question whether the consent of the state of the accused's nationality should be required.

It was recognized that the ceding of jurisdiction principle could, if the statute required this, prohibit some countries from acceding to it. For example, countries whose constitutions precluded the surrender of nationals could not surrender such a person to an international court. This was one reason for distinguishing acceptance of the statute from acceptance of jurisdiction over specific offences.

B. JURISDICTION

Acceptance by a state of the jurisdiction of the international tribunal or court

This issue raises the question of how a state would accept the jurisdiction of a tribunal or court and what are the consequences of this acceptance from the point of view both of the cases which the state accepts as within the jurisdiction of the tribunal or court and cases in which the state plays a role in bringing before the tribunal or court. It also raises the question of the readiness of states to accept the financial and resource issues involved in establishing a tribunal or court.

In dealing with what offences should be within the competence of either an *ad hoc* tribunal or permanent court, some issues were found to overlap with questions addressed in relation to the basis of jurisdiction. For example, the categorization of the conflict in the territory of the former Yugoslavia and the capacity, if any, of the tribunal to determine this could have a bearing on the range of offences, notwithstanding that war crimes are not limited to grave breaches of international humanitarian law. On the other hand, there is a question of the applicability of common article 3 of the Geneva Conventions in determining serious violations of humanitarian law.

In relation to the proposed *ad hoc* tribunal envisaged by Security Council resolution 808, the view was expressed that war crimes were easier to define than crimes against humanity, yet the latter category should be included, possibly with a reference to the scale - massive or systematic - in which they were perpetrated and/or the goal sought to be achieved by their perpetration. Some were of the view

that given the unlikelihood of prosecutions occurring under national law no reference should be made to the scale on which offences were committed, thereby giving the *ad hoc* tribunal greater flexibility.

(i) *Ad hoc* tribunal

If a resolution of the Security Council establishing an *ad hoc* tribunal also determined its jurisdiction, that resolution would have a binding effect on all states under Chapter VII of the United Nations Charter. Nevertheless, the effect of the resolution would be different between states of the former Yugoslavia and other states, since the jurisdiction of the tribunal would only extend to offences committed in the territory of former Yugoslavia. Other states might need to cooperate with the tribunal in the performance of its tasks (judicial assistance, extradition, etc.), and ancillary agreements to this effect might be necessary.

It was noted that for an *ad hoc* tribunal created by Security Council resolution to be effective, it might need the support of domestic legislation, supporting treaties or both. For example, domestic legislation would probably be required to permit the tribunal to sit in a particular country and to authorize the detention of persons sentenced by such a tribunal. Existing mutual assistance in criminal matters and extradition treaties designed to permit cooperation between states were not likely to be applicable in relation to an *ad hoc* international tribunal.

Given that the *ad hoc* tribunal is to deal with conduct occurring in a particular geographic area during a given period of time, the view was expressed that the tribunal should be given specific, restricted powers required to base its determinations on existing international law and should have no power to change or develop the existing international law.

(ii) Permanent court

Acceptance of the jurisdiction of the court could be realized through ratification of the statute of the court or through a separate declaration of either a general or specific nature, e.g. confined to certain offences. In view of the maximum flexibility it would afford, the latter option seemed to be more feasible.

It was agreed that, both as a matter of law and politics, different criteria necessarily applied in determining what offences should be within the competence of a permanent court. For example, it could not always be assumed that such a court was filling a judicial vacuum.

As a permanent court would need to be established by a convention, it was likely that the states prepared to accede would vary inversely with the

number of offences over which the court was to be given jurisdiction. The decoupling of the proposed Code of Crimes Against the Peace and Security of Mankind and the Statute of the International Criminal Court was advocated by many. Examples of the limited range of offences which might form the "core" of the jurisdiction of the court were genocide and war crimes.

The greater the number of offences to be included in the potential jurisdiction of the permanent court, the greater the need for an "opting in" system whereby states could accede in respect of some of the offences only. This is essential if the permanent court is to achieve any degree of international acceptance. However, it was noted that this could lead to difficulties in determining the jurisdiction of the court in particular cases.

Existing conventional offences, such as hijacking, hostage-taking and torture were considered. The view was expressed that, with the exception of "state sponsored" conduct, the existing provisions for universal jurisdiction, mutual assistance and extradition appeared to achieve the desired results, and that as a consequence there was not the same need to include these within the court's "core" jurisdiction. The difficulty in relation to "state sponsored" criminality was that where the perpetrators returned to the "sponsoring" state, an international court would, except for the possibility of a trial *in absentia*, be powerless.

Given the developing nature of international criminal law, some of these considerations may change. For example, if aggression were to become an international offence defined by treaty there would be real doubts as to the appropriateness of judicial determination by national courts and the matter might need to be left exclusively for determination by an international court.

Jurisdiction of the international tribunal or court versus that of national courts

Exclusive reliance on trials by national jurisdictions has shown its limitations. In some cases, either because of the lack of political will or the difficulty in bringing a person to trial, it was felt that an international tribunal or court could be more effective to deal with certain types of serious international crimes.

The issue of the relationship of the jurisdiction of the tribunal or court and that of national courts of states which have accepted the jurisdiction of the former might be approached from four perspectives: exclusive jurisdiction (the jurisdiction of the international body would replace that of national courts for certain crimes), concurrent jurisdiction (which creates a situation of equality between the position of the international body and the domestic courts), preferential jurisdiction (the international tribunal or court would have its own priority jurisdiction) and appellate jurisdiction (the international body would be the appeal instance in respect of national courts for certain crimes).

All options have their advantages and disadvantages.

(i) *Ad hoc* tribunal

Some were of the view that in the case of the *ad hoc* tribunal concurrent jurisdiction would be the more suitable and acceptable, particularly given the likely volume of cases. A strong view was that as the tribunal was designed to fill a "judicial vacuum" it could be unsound to provide for concurrent jurisdiction with the states of the former Yugoslavia. The international community should not be prepared to tolerate unfair trials or "victor's justice" in relation to some offences. According to this view, the *ad hoc* tribunal must have at least preferential, if not exclusive, jurisdiction in relation to offences committed in the territory of former Yugoslavia. An issue hitherto not addressed was raised as to what role, if any, the *ad hoc* tribunal should have in the case of an unfair trial by a national court of a member of an ethnic minority sentenced to death.

Finally, in relation to the proposed *ad hoc* tribunal, the concept of *ne bis in idem* was considered. It was agreed that the principle would not be binding on the tribunal in cases where a matter was not diligently pursued before an impartial tribunal, for example where the national proceedings amounted to a "whitewash". The tribunal could try persons already convicted of a war crime or crime against humanity for offences other than those to which the conviction relates as the *ne bis in idem* principle would not apply.

(ii) Permanent court

In the case of a permanent court concurrent jurisdiction was regarded as preferable in order to gain support from a majority of states.

The meeting then considered whether any jurisdiction of a permanent international court, even over "core" offences, should be either compulsory or exclusive.

Some expressed the view that if the court had no compulsory jurisdiction, even if only over a small core of offences, it would have no credibility and hence not be effective. Others expressed the view that the jurisdiction need be neither compulsory nor exclusive. Nor was compulsory and exclusive jurisdiction regarded as synonymous. Some who were in favour of a small hard core of compulsory jurisdiction offences did not regard it as essential that that jurisdiction be exclusive. Aggression, should it become an offence defined by treaty, was regarded by many as raising different issues connected with state, as opposed to individual, criminal responsibility even though individuals could be criminally responsible as authors or planners of the commission of the offences.

Some saw universal jurisdiction, national jurisdiction and the proposed international jurisdiction as being complementary.

Conditions under which prosecutions may be brought before the international tribunal or court

Several mechanisms were suggested for triggering the jurisdiction of the international tribunal or court: transfer of national proceedings by the state having national jurisdiction, denunciation by any other state, orders of an international organisation (to be specified in the statute, e.g., the Security Council) or complaints or actions by individuals or non-governmental organisations having a recognized interest.

It was felt that certain circumstances would constitute legal bars for bringing or completing prosecutions before the tribunal or court: death of the accused, time limitations (these might not be applicable due to the seriousness of the crimes to be prosecuted), double jeopardy (subject to the jurisdiction of the tribunal or court versus that of the national court, i.e., concurrent with respect to the permanent court or preferential jurisdiction with respect to either an *ad hoc* or permanent body) and serious defects in the pre-trial investigative procedure (e.g., illegal abduction of the accused person or illegally obtained evidence).

The requirement of the consent of a state other than that in which the crime was committed was raised at several occasions. It was mentioned that this issue might have arisen from a misconception between public international lawyers and criminal justice lawyers on the issue of liability of states as opposed to that of individuals. By ratifying the existing criminal international law conventions, all states have recognized that any one of them could be required to cooperate for the purpose of prosecuting an alleged offender. This requirement cannot be undermined by any non-party to the convention. This situation is different from that before the International Court of Justice, for instance, where a state cannot be subjected to a jurisdiction it did not recognize. On the other hand, the try or extradite provisions in some Conventions (e.g. the Montreal Convention) clearly contemplate only trial in a national court and this might create difficulties *vis-a-vis* states not parties to the statute, or states parties to the statute which had not recognised the court's jurisdiction over the crime covered by the Convention.

Jurisdiction *ratione personae*

There appeared to be consensus that the jurisdiction of the *ad hoc* tribunal and, in its first years at least, of the permanent court would be limited to individuals, including state officials notwithstanding their functions and immunities, as opposed to states. The official position of the accused should not be a bar to prosecutions, at least with regard to *ad hoc* tribunals dealing with war crimes. Some concern was expressed about the relationship of trials of officials to state reponsibility in regard to the range of crimes that a permanent court might deal

with. The issue was raised as to whether the jurisdiction should also cover persons as members of certain criminal organizations.

Concerning the issue of whether juveniles could be tried by the tribunal or court, given their particular situation in most states, the views was expressed that the jurisdiction should be limited to persons fully responsible at law.

Jurisdiction *ratione materiae*

1) Code of Crimes against the Peace and the Security of Mankind

Concerning the relationship between the draft Code of Crimes against the Peace and the Security of Mankind and the creation of the permanent court, it was felt that the two issues should clearly be separated, as proposed by the International Law Commission. More work would need to be done on the draft Code of Crimes to render it generally acceptable to states before it could form the basis for a trial either by a national or international tribunal or court. Others thought that once the draft Code of Crimes had been adopted, it could become a source of law for the permanent court but not the sole or primary source.

2) Jurisdiction to issue advisory or binding opinions

There was little support for the tribunal or court to have jurisdiction over disputes between state parties regarding the interpretation and application of international criminal law conventions.

3) Scope and nature of crimes within the jurisdiction of the international tribunal or court

There was extensive discussion of the crimes which would be included within the jurisdiction of the tribunal or court. Generally, it was felt that the tribunal or court should at least have jurisdiction over crimes which are already recognized by certain existing international "universal jurisdiction" conventions, including the Geneva Conventions. This, however, raised the issue of whether the crimes defined in these conventions were specific enough to be applied by an international criminal tribunal or court, having regard to the principle *nullum crimen sine lege*.

The desirability of adopting a selective approach by which each state adhering to the statute of the court would be able to choose the crimes which could be tried by the court was also discussed. Another suggestion was that it would not be possible for a state to recognize the jurisdiction of the court before having agreed to a core of crimes (presumably the ones upon which there is a substantial consensus); following that, at a later stage, the state could agree to expand the jurisdiction of the court on a piecemeal approach (e.g., by protocols).

Following considerable debate in which the advantages and disadvantages of such an approach were raised, it was generally agreed that the former approach would permit maximum flexibility and encourage broader recognition of the court.

(i) *Ad hoc* tribunal

The extent of the crimes to be tried under the jurisdiction of the *ad hoc* tribunal is limited in view of resolution 808, i.e., "the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991". It was generally understood by the meeting that, this meant war crimes, but that the specific reference to international humanitarian law excluded other crimes against humanity. This being said, the crimes over which the tribunal is to have jurisdiction needed to be defined more specifically in order to permit the *ad hoc* tribunal to respect the principle of legality.

(ii) Permanent court

In its early stages, the jurisdiction of the court should be limited to a certain number of offences, as determined by each state.

C. APPLICABLE LAW

A distinction was made between the subject matter jurisdiction of the tribunal or court and the source of the law it would apply. Concerning the latter, pursuant to the principle *nullum crimen sine lege, nulla poena sine lege*, it is clear that there must be an articulation of the crimes on which the tribunal or court could adjudicate.

1) The definition of crime

It was agreed that the *ad hoc* tribunal could only try war crimes and crimes against humanity which existed at the time and in the place of commission. But there was no agreement as to whether this would be determined by reference to customary or conventional international law. Many expressed the view that, for the purposes of the *ad hoc* tribunal, reliance should not be placed primarily on customary international law, which lacks specificity, as this would infringe the principle *nullum crimen sine lege*. This made the question of definition, as identified in the French proposals, all the more important.

With respect to the use of internal law as being the applicable substantive law of the court, the *ad hoc* tribunal and the permanent court need to be addressed separately. In the first situation, internal law might be used by the tribunal to supplement international law for prosecution purposes. In the case of the permanent court, the issue could either be left at the discretion of the court or the statute could specifically

address this issue. However, any national law provisions which were inconsistent with international law should not be recognised.

Concerning the definition of the crimes to be adjudicated by the court, the view was expressed that the applicable law of the court again should not be based upon customary law (although it could be important for interpretative purposes), but rather upon proscriptions of crime as defined by international conventions. Nor could the court wholly rely on the language of the Geneva and other conventions. First, the elements of the offence may not be adequately defined in the relevant convention. Second, it was noted that, in particular for countries where treaties were not self-executing, domestic legislation was enacted to provide that specificity. Prosecutions within such states would be based on the domestic law - including substantive laws as to defences - and domestic procedural law. Third, while some conventions actually declare conduct to be an international crime (e.g. genocide), most oblige states only to consider prosecution or to extradite.

The international tribunal or court may therefore be faced with differing substantive and procedural laws in relation to offences against international law. Notwithstanding the desirability perceived by some of applying universal standards wherever possible, and in some cases the undesirability of relying on national laws, a hierarchical approach may be necessary in some cases. In the first place, applicable international law prevails over any national law but reference to internal law may be needed for either supplemental or interpretative purposes. On one view the latter may be preferred where a state cedes its jurisdiction to the court. Possibly the tribunal or court might be given a residual discretion to determine the most appropriate law where direct application of international law is inadequate to meet the needs of the principle of legality and of precision. The tribunal or court could then apply either the law of the state where the offence was committed or the law of the state of nationality of the accused where that latter state has extra-territorial jurisdiction over the offence under its domestic law.

2) General principles of liability and defence

There was widespread agreement that there is no internationally agreed body of law to be applied in respect of principles of liability and defence. Therefore, in the case of an *ad hoc* jurisdiction, the tribunal might apply the internal law of the relevant state although care had to be taken to exclude defenses inconsistent with general principles of law recognised by the community of nations. In the case of a permanent court, efforts should be made towards codifying these principles, but that might be a lengthy task. The statute of the court could attempt to define the types of conduct and complicity that should be covered, rather than using expressions which may be unknown to some legal systems or convey different meanings (e.g. "conspiracy", "complicity"). In the short term there may be no alternative but to rely on national law.

On a practical note, concern was raised about the status of a possible defence of superior orders. It was pointed out that the International Conference had rejected the inclusion of an equivalent provision in Protocol I to the Geneva Conventions. Some participants believed that the principles of Nuremberg could be referred to in order to address this issue.

3) Protection of the accused

There was widespread agreement that international human rights standards should be applied in all cases whether by an *ad hoc* tribunal or by a permanent court. However, it was suggested it would be unwise to simply include for example articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR) in the statute for an international tribunal or court, since the wording could convey different meanings to persons from different legal systems. In addition to the international human rights instruments which exist, reference was also made to non-treaty norms, standards and guidelines adopted in the field of crime prevention and criminal justice, such as those adopted by the United Nations Congresses on the Prevention of Crime and the Treatment of Offenders. Some believed that the fact that these other instruments were not mentioned specifically in the statute would be immaterial. Whilst these norms, standards and guidelines are not legally binding, they could be resorted to as aids to interpretation of the ICCPR and other instruments binding at international law and recognising the right to a fair trial.

In the case of an *ad hoc* tribunal, standards as established by the internal law of the reference state may be applied, with necessary modifications, where these standards are consistent with international standards and would enure to the benefit of the accused, provided that their application would not necessitate the tribunal to interpret national constitutions as opposed to settled principles.

D. STRUCTURE OF AN *AD HOC* TRIBUNAL OR PERMANENT COURT

While the possibility of establishing regional courts should not be overlooked, there have been continuing developments towards the creation of a universal international criminal court. Most participants agreed that any court which may be established should be an independent, self-contained judicial body linked in an appropriate way to the United Nations. The permanent court should be a permanent standing body, but not operating on a full time basis. The issues of the seat of the court, the languages which it would use and the costs involved were also discussed.

It is difficult at this stage to evaluate the workload which both the *ad hoc* tribunal and the permanent court could face. The general impression was that only the most serious cases would be tried by a permanent court but there were divergent views as to the workload of the *ad hoc* tribunal. The workload would have a direct bearing on the composition of both bodies.

Composition of the international tribunal or court

Principles should be established on the composition of the tribunal or court. For example, the judges should come from all regions and represent all legal traditions. The criteria of integrity, impartiality and independence should be of the utmost importance. It was suggested that the candidates would be qualified if they hold or have held high judicial offices in their country or have the necessary practical experience in criminal matters.

Reliance on a series of panels of judges attracted support. There was general agreement that cases should be tried by chambers of three or five judges.

In the permanent court, it was suggested that there should be a large number of judges who would be eligible for selection to a panel by the bureau of the court or the president, although some felt that the latter option would be too onerous for a person with these functions. No judge on a panel should be a co-national of the accused.

Again, in the case of the permanent court, a standing committee representing the interests of the member states could be created and play a role in such matters as the election of the members of the court and the selection of the procurator general. However, concern was expressed that this body should not be in a position to infringe upon the independent exercise of the judicial power of the court.

It was also generally felt that there was a need for an independent Prosecutor's office, which would be responsible for the conduct of the criminal investigations. This office should be separate from the court *per se*, in order to comply with the principle of the division of powers between judicial and executive bodies. There was little support for the idea of establishing the Prosecutor's office within the United Nations office of Legal Counsel, nor within Interpol. The prosecutor's office could be composed of prosecutors and investigators, the latter performing their duties under the direction of the prosecutors. One view expressed was as to the desirability of an investigating magistrate to conduct the investigation in the presence of the prosecutor, while leaving it to the prosecutor to indict on the basis of the evidence disclosed during the investigation. The view was also expressed that care must be taken to ensure that any investigation be completely under the control or supervision of the office of the prosecutor.

A secretariat or registry to deal with administrative, financial and clerical duties also would need to be established.

Election of members of the international tribunal or court

As regards the procedure of appointment of the members of both the *ad hoc* tribunal and permanent court, it was suggested that the formula for the International Court of Justice be used, ie. election by the General Assembly and the Security Council on

the basis of a list of candidates nominated by national groups in the Permanent Court of Arbitration. Another option would be for state parties to elect them by secret ballot or for the General Assembly to do so. No conclusion was reached on this issue.

In the case of the permanent court, the judges should be appointed for a specified period of time while, in the case of the *ad hoc* tribunal, the tenures of the judges would cease when the work of the tribunal was completed.

Review process

Taking into account article 14(5) of the International Covenant on Civil and Political Rights, two options were considered: an appellate review or a judicial review. The first option was considered in light of Article XV of M.C. Bassiouni's draft, the Italian Commission of Experts' draft and the CSCE proposal. The latter option represented the suggestion of the French Committee of Jurists.

Notwithstanding article 14(5) of the International Covenant on Civil and Political Rights, some participants questioned the appropriateness of an appellate process in relation to determinations of the international tribunal or court in view of the costs and delays involved, as well as the exceptional quality and the special nature of the tribunal or court. If appeals, reviews or revisions were to be available, then no judge who was involved at first instance should be a member of the appellate chamber.

E. PRE-TRIAL AND TRIAL PROCEDURES

Reconciling the procedures of the common law and the civil law systems was continuously adverted to in the discussions concerning pre-trial and trial procedures. This issue will need to be carefully considered in the development of procedures before the international court. Another issue of great concern was the extent to which there might be a role for the Security Council in the transfer of the accused to the international tribunal or court and in the decision to prosecute.

Bringing the accused to trial

Since the cases to be tried by the international tribunal or court are international in character, effective cooperation with the criminal law authorities in foreign states is vital to guarantee that all evidence is available during both the investigations and the hearing. The presence of the accused must also be assured.

The threshold issue to be decided is whether and in what circumstances the tribunal or court may undertake proceedings in the absence of the defendant. Views were divided on this question.

Some believed that trials *in absentia* could be legally acceptable in certain clearly defined cases in which the rights of the accused were protected (including by certain criminal procedural rules, pre-trial investigation, warrant of arrest, indictment, etc.) and provided that the accused could be retried *de novo* with full rights if that person reappeared or surrendered.

However, many participants believed that trials *in absentia* were undesirable from both a policy and a political point of view and had no place in an international scheme. Even with the possibility of a trial *de novo*, these participants doubted whether a trial *de novo* could be fair and whether it would respect the right to the presumption of innocence. In any event, according to this view, a trial *in absentia* procedure would undermine the legitimacy of the tribunal or court and could have the undesirable effect of inhibiting states from becoming parties to the statute of the court. Unacceptable behaviour could be denounced through other means, such as the issuance of an accusation and the publicizing of an arrest warrant.

The label of the legal procedure under which an accused is transferred within the jurisdiction of the tribunal or court (extradition, rendition, surrender or delivery) may vary from one state to another. Depending on the particular factual situation, the transfer could well be equivalent to extradition, in which case constitutional and legislative provisions and prohibitions relating to extradition would apply unless duly modified.

(i) *Ad hoc* tribunal

If the tribunal is established on the basis of a resolution of the Security Council, states would have an obligation to cooperate, which might well include the obligation to transfer the accused to the tribunal. This still raises the problem of the effect of the resolution. A state might need to amend its own law in order to be able to comply. For example, a constitutional guarantee against extradition of nationals would need to be amended in order for accused from that state to be extradited to the tribunal.

If the *ad hoc* tribunal is established by treaty, then the procedures concerning the transfer of an accused to a permanent court were regarded as appropriate.

(ii) Permanent court

State parties to the statute creating a permanent court would be bound by an explicit rule relating to the transfer of an accused. Accordingly, any necessary amendments to the legislation or constitution of a state would have to be made before the state could become a party to the statute. Transferring an accused from a non-party state would require an explicit *ad hoc* agreement.

Most participants believed that there should be no need for a *prima facie* case to be established in a national court before an accused could be transferred to the

international tribunal or court. Although the procedural arrangements would be similar to those normally included in inter-state treaties or in instruments such as the United Nations Model treaty on extradition (rights of the accused, provisional arrest, form and content, rule of speciality), grounds for refusal to transfer an accused to an international jurisdiction should be kept to a minimum, provided that the death penalty cannot be applied by the international jurisdiction. The political offence exception, for instance, should not be permitted. This conclusion would have, however, to be reviewed if the Security Council were to have a role in the triggering of investigations or international cooperation procedures. Most participants believed that, by definition, the international jurisdiction would be bound to apply guarantees existing at the international level.

Since it would go beyond normal obligations in treaties, it would be difficult to imagine that a state which is not a party to the statute of an international court could extradite an accused to a state party in order for that state to extradite the accused to the international tribunal.

The possibility of having a separate body connected to the permanent court to produce and execute arrest warrants for automatic implementation in a state was excluded since there were doubts that states would confer this jurisdiction upon the permanent court. In the case of the *ad hoc* tribunal, there seemed to be a much stronger case for compulsory enforcement. The issue of contempt of the international tribunal or court was also raised in relation to this item.

Investigation of crimes with mutual assistance in criminal matters

Since in global terms, and even in the absence of a treaty, mutual assistance can be effected more widely than extradition, there is less need here for an explicit arrangement.

(i) *Ad hoc* tribunal

As in the case of the transfer of an accused, a Security Council resolution establishing the *ad hoc* tribunal should mention the duties of the states in respect of mutual assistance. Changes to constitutional or domestic law could be required for states to be able to comply with these obligations. If the *ad hoc* tribunal is established by treaty, then the same criteria as for a permanent court would be applicable.

(ii) Permanent court

Once again, the issue of whether an explicit arrangement on mutual assistance should be included in the statute of a permanent court has to be addressed. As in the case of the transfer of an accused, one must differentiate as to whether parties to the Statute or third non-party states are concerned.

The normal provisions concerning mutual assistance should be applied. The United Nations model treaty on mutual assistance was referred to as a useful example. Concerning the execution of the request for assistance, it was suggested that a combination of civil law and common law principles be applied rather than strictly the law of the requested state. It was felt necessary that the court be able to order compulsory preliminary measures. The issue of temporary transfer of incarcerated individuals, possibly with the approval of the individual concerned, would have to be considered. Under the same conditions as those mentioned concerning the transfer of an accused, it was felt that the traditional grounds for refusal should not be accepted in the case of mutual assistance.

Investigation of crimes where mutual assistance in criminal matters is not possible

Three individuals with experience in war crimes investigations in various armed conflicts provided the meeting with experiential information as background material for discussions. One is a member of the United Nations Commission of Experts established by Security Council resolution 780 (1992), which was mandated to examine and analyze information submitted by governments, United Nations bodies, intergovernmental organizations and other sources, together with such further information as it could obtain, with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.

It was recognised that the investigation of alleged crimes in the context of a continuing armed conflict raises particular problems, including conflicting claims of sovereignty, control over the movements of investigators by occupying forces and, importantly, the issue of who bears the costs. In an international context, whether at the scene of the crime or within the territory of another nation, a criminal investigation would require the collection of admissible evidence related to the alleged crime, and this in turn would require obtaining the consent of local authorities, visits to the crime scene, mass exhumations, identification of witnesses, etc.

The composition of an investigatory body would depend on the nature of the investigation which would have to be undertaken. For example, it could include experienced criminal investigators, but might also include military engineers, intelligence analysts, lawyers, photographers, forensic pathologists, translators and interpreters. The powers conferred upon any investigative entity would have to be clearly spelled out. It is desirable that the investigatory body, subject to appropriate safeguards, be able to compel testimony and the production of other evidence.

Given the nature of some of the allegations of atrocities committed in the territory of the former Yugoslavia, the meeting considered the treatment of victims, both in the context of pre-trial and trial procedures. In particular, this was prompted by

allegations of sexual atrocities perpetrated as forms of torture, sex and ethnic discrimination, bordering on, if not amounting to, genocide.

It was recognised that investigations and prosecutions for mass rape practised, according to some, as genocide may require extreme sensitivity and may require the development of some original procedures. This was all the more so because of the cultural and religious background of the victims. Questions of witness protection and asylum were also discussed, as was the right of appeal or review against a decision not to prosecute.

(i) *Ad hoc* tribunal

The United Nations Commission of Experts lacks compulsory powers. Another serious problem faced by the Commission is determining the applicable law for the collection of evidence, bearing in mind the possibility of prosecutions resulting from the investigations. In order to respect the principle of legality, as opposed to political considerations, it was felt that the Commission should be guided by a number of international instruments as well as the relevant provisions of the draft proposals on the *ad hoc* jurisdiction and M.C. Bassiouni's draft statute concerning the international criminal tribunal. Additionally, the investigations have to be conducted with sensitivity and respect for local attitudes.

The following considerations and principles are applied to the collection of evidence of crimes committed in the former Yugoslavia: gathering of all relevant evidence, the recognition of the presumption of innocence, guarantees recognized by international law, the best evidence rule, independent corroboration and analysis of evidence, and, where possible, the use of existing national law. Concerns were raised on the preservation and continuity of evidence as well as the administration of the information obtained through the investigatory process.

It was suggested that the United Nations Commission of Experts should be involved if prosecutions for crimes committed in the former Yugoslavia are undertaken at a later stage. If the Commission were to be dissolved before that time, it was felt that an investigatory body would still be required in order to collect admissible evidence. If the *ad hoc* tribunal is established whilst the Commission of Experts in existence, then in order to secure continuity and to prevent interruptions to ongoing investigations, the Commission of Experts should be attached to the tribunal.

(ii) Permanent court

As in the case of the *ad hoc* tribunal, two questions need to be addressed: who should conduct the investigation and what methods should be used? In the case of a permanent court, two possibilities could be envisaged. If the

relevant national legal system functioned in an appropriate manner, it could perform some at least of the investigative functions. In other cases, where the state refuses to cooperate or where the criminal justice system has broken down, all investigations would have to be carried out by an outside body.

Several international investigatory bodies were considered. Under Article 90 of Protocol I to the Geneva Conventions, states parties which had made the necessary declaration could ask the International Fact Finding Commission, established in March 1992, to investigate "grave breaches" or serious violations of humanitarian law in international conflicts. Parties to non-international conflicts could also invoke the same mechanism, as declared by the Commission itself. Some expressed the view that it was desirable for the parties to the conflict in the territory of former Yugoslavia to call for the International Fact Finding Commission to supplement the fact finding being conducted by the United Nations Commission of Experts.

Evidence

In establishing an international tribunal or court, there is an obvious need to address the issue of evidence in order to advance rationality, for efficiency considerations and in order to implement various policy choices. Among the conditions for a rational evidentiary process, the issues of the common community of experience and knowledge and the independence of the investigators were emphasized.

Concerning the former, it was felt that, in order to be able to evaluate evidence, there needs to be an understanding of the social background of the witnesses. This gave rise to the question of advisors to the tribunal or court. Independence could also be compromised if the investigator was to be bound by decisions on evidence of a political organ, such as the Security Council or the General Assembly.

The need to protect witnesses from reprisals was again emphasized, but differing views were expressed on techniques for doing so. While some suggested that the use of written testimony or videotapes would be useful to preserve evidence, others expressed concerns that the use of such evidence would limit the defendant's ability to challenge the witness whose testimony was recorded.

Concerning the issue of the suspension of human rights in periods of emergency, it was generally felt that humanitarian law guaranteed the right to a fair trial in cases of armed conflict, a supreme case of emergency. Thus, it would be inappropriate to require a lesser standard from an international tribunal, especially as such a tribunal would often exercise jurisdiction precisely because national courts were unwilling or unable to ensure that defendants receive the right to a fair trial.

The issue of illegally obtained evidence, hearsay and of full disclosure of information to the accused were differently treated by common law and civil law jurisdictions. It was generally felt that, under an international tribunal, these issues

would have to be addressed in a fashion consistent with internationally recognised principles.

In light of the perceived difficulties in gathering evidence in former Yugoslavia, it was suggested that these problems could be addressed in some cases by the use of judicial notice of certain facts or by the use of rebuttable presumptions. For example, it was suggested that there could be a rebuttable presumption that if an officer was present when a crime was committed in his or her presence by a subordinate, command responsibility existed with respect to that officer. Others, however, argued that rebuttable presumptions would be inconsistent with the presumption that a defendant is innocent until proven guilty according to law by proof beyond a reasonable doubt as guaranteed by article 14 of the International Covenant on Civil and Political Rights.

Rights of the accused

It was pointed out that the rights of the accused to a fair trial are laid down clearly in the Geneva Conventions and the other international instruments. These rights include: the right to a proper and unbiased trial and defence, legal representation of choice, the right to presumption of innocence, the right not to be compelled to testify, appeal possibilities, etc.

It was generally agreed that the accused should be accorded the fullest rights including rights to challenge the arrest, any proposal for transfer to the tribunal or court and again when before the tribunal or court to raise, e.g. identity and sufficiency of evidence. Thus these rights would include the right to challenge the prosecution prior to the commencement of the trial.

The ability of the accused to raise these rights further the legitimacy of the tribunal or court.

Procedural Rules

There clearly is a need for the development of procedural rules for trials to proceed before the tribunal or court, although it might be difficult to include all relevant rules. Hence a certain degree of discretion should be left to the tribunal.

(i) *Ad hoc* tribunal

Basic procedural and evidentiary rules could be developed by the Secretary-General on behalf of the Security Council then submitted to the tribunal for expansion or amendment and referred back for possible final approval by the Security Council.

(ii) Permanent court

It was generally agreed that one of the first functions of the court in plenary session would be to set any draft rules of procedure and evidence and to recommend necessary changes based on acceptable international standards. After the approval of these changes, possibly by a standing committee representing the interests of member states, the rules as amended should be annexed to the statute of the court.

The use of information obtained as a result of preliminary enquiries was raised and a system permitting its disclosure to the defence was preferred. This view was based on fairness to the accused as well as the speed and efficiency of the procedure. Decisions would need to be taken as to whether an inquisitorial or adversarial system or a mix of both would be adopted during the pre-trial and trial process. Issues such as the right of an accused to plead guilty need to be addressed, as well as the right of parties to cross-examine witnesses. The right of the prosecutor to grant immunity to witnesses in return of their testimony should also be dealt with, in addition to the right of the accused to testify under oath.

The issue of the discretion of the prosecutor in bringing an accused to trial raised considerable discussion. It raised questions of the public interest and the perception of the prosecutor's integrity. Generally, it was felt that, since prosecutors were to be persons of high integrity who would be responsible for their professional acts before the standing committee, they should be given a prosecutorial discretion as to whether or not to institute proceedings. If a decision is taken that there is not sufficient evidence to bring a case before the tribunal, the chief prosecutor could file a report to the secretary or registrar of the tribunal which would then be transmitted to the standing committee and made public. Guidelines for the conduct of prosecutions should be drafted.

Concerning the appeal process, most participants believed that the appeal should not be a retrial of all facts debated at first instance: an appeal should only be based on fundamental errors of law, process or fact. There were differing views as to whether the prosecution and the accused should be allowed rights of appeal or whether only the accused should be granted those rights.

Some participants raised concerns about the possibility of the privilege of certain witnesses against self-incrimination by virtue of being a witness for the prosecution. It was agreed that in these circumstances this might give rise to a requirement to grant immunity against prosecution, but this is a matter for the prosecutor's discretion. The issue of prosecutions for perjury and the question of plea bargaining would also need to be addressed.

Role of victims

The question of victims was also addressed in the context of trial procedures. There was support for the concept of a degree of victim involvement in the trial process but divergent views were expressed as to whether a victim should have party status. It was also noted that the point at which a person became a witness varied in different legal systems.

Issues identified to which further consideration should be given include whether victims should have the right to separate legal representation and whether they could independently institute proceedings in the tribunal.

It was regarded as necessary in some cases to preserve the anonimity of witnesses, both by restricting public access and by precluding the publication of the identity of victims or of any material from which that identity could be deduced or inferred. Some favoured victims not being recalled after giving evidence but the majority view was that, where fairness so demanded, witnesses could be recalled to give further testimony.

F. ENFORCEMENT OF SANCTIONS

This is an essential issue to be resolved. An international tribunal or court will not be credible, and will produce none of the results which are sought from its creation - either in terms of doing justice in a given case or of deterring others from committing crimes - unless proper arrangements are made for the enforcement of sanctions. This is not merely an "add-on" or optional issue to be resolved. It was better to do nothing than merely to appear to be doing something.

In one sense enforcement covers a much wider range of issues relating to the process of the tribunal or court. It extends to such matters as compelling the attendance of the accused, or of witnesses, arrangements for detention of an accused pending trial, the production of evidence, punishment of perjury, etc. Some of these issues are dealt with elsewhere in the report. In this section, the focus is on the enforcement of the penalty decided on following a final decision of the tribunal to convict an accused. That issue, therefore, would only arise once the final decision had been made and either the time for any appeal or review had passed or such appeal or review had resulted in a confirmation of sentence.

Excluded from the topic of enforcement of sanctions in this narrower sense, accordingly, was the issue of trial *in absentia*, which is discussed earlier in this report. However, two points were made. First, the great difficulties relating to the enforcement of process and of penalties reinforced the view of those participants who favoured the possibility of trial *in absentia*. Second, it would be necessary to spell out the consequences of trial *in absentia*, in terms of the obligation of third states to render up the person so convicted, and whether conviction *in absentia* would amount to a form of international outlawry to be enforced at least by the

member states to the statute, or under the United Nations Charter. On the first point, it was pointed out that even the proponents of trial *in absentia* only advocated its use in exceptional cases, and that the issue of eventual enforcement could not be evaded by this means.

On the enforcement of sanctions two categories of question were raised: the range of sanctions, and the method(s) of enforcement of such sanctions.

The range of sanctions

A threshold issue, particularly in relation to possible compensation judgments, related to whether sanctions could be imposed only against individuals or also against states, corporations and possibly other organizations. Given the earlier views in relation to the jurisdiction *ratione personae* of the tribunal or court, primary attention was concentrated on individuals.

Leaving aside the question of the death penalty, to be separately addressed, the issue arose as to the nature and extent of the sanctions or penalties which could be imposed. In relation to serious breaches of international humanitarian law, the *ad hoc* tribunal might have a limited range of options, the expectation being that long term incarceration would ensue due to the need to demonstrate exemplary punishment. On the other hand, a permanent court dealing with a wider range of offences might benefit from having more creative options available to it in some circumstances. The permanent court could have the power to imprison from one day to life; to order compensation, forfeiture or confiscation, as well as, in limited cases, to order community service in aid of the victim or society at large. Any sentence or sanction imposed must comply with existing international standards.

Even in relation to major war crimes, whilst a non-custodial sentence would be in appropriate for major offenders, such a sanction may be appropriate for persons who acted under duress or who were accessories after the fact.

In relation to sentencing principles, factors taken into account in national jurisdictions are equally relevant to an international one. Relevant facts include the nature of the offence, the age and position of the offender, the interest of the victim, and the balance between the rehabilitative and deterrent aspects of sentencing. Whilst in the case of an *ad hoc* tribunal dealing with serious breaches of humanitarian law a heavier emphasis would be on the exemplary and deterrent nature of the penalty, United Nations norms, standards and guidelines place an emphasis on both rehabilitation and on the interest of victims being taken into account, neither necessarily accomplished by lengthy incarceration.

As in the case of the applicable law for an international tribunal, considerable discussion occurred as to whether national punishments for offences should be applied by an international tribunal or court or whether the statute or other constitutive document should explicitly state the potential punishments and the

extent of the judicial discretion with respect thereto. In favour of relying on national penalties were factors such as certainty for accused persons, consistency with national trials in cases of concurrent jurisdiction and a perceived increased public support for the tribunal. According to this view, the consistency point was reinforced by the fact that conduct which would be the subject to trial in the international tribunal would also be prohibited under national law. Arguments against applying national penalties related to the difficulty, particularly in times of war, of establishing the applicable national law and the fact that there can be wide divergencies in penalties for the same acts: e.g. drug-related offences. On this view, if it was considered important enough to establish an international tribunal or court, that body should warrant its own sanctioning provisions.

A median position would apply the upper and lower sentencing limits contained in the appropriate national law, and conferring a discretion within these limits. This course would not address the situations where it was difficult to ascertain the appropriate national law. An alternative was to establish ranges of penalties for the tribunal or court, e.g. up to ten years, up to life imprisonment, and perhaps some minimum sentences.

Other sanctions, including compensation, were also considered. *Quaere*, however, whether it is practical for an international tribunal, especially *ad hoc* to be involved in ongoing compliance action.

Divergent views were expressed on the ability of either an international *ad hoc* tribunal or permanent court having the ability to impose the death penalty. The majority view was that the death penalty should not be an option, even for offences carrying that penalty under an appropriate national law. Arguments in support of this view were based on ongoing international efforts to abolish capital punishment, as well as the fact that the penalty was not included in conventions - even those dealing with such serious conduct as genocide. On this view, reinforced by moral and practical considerations, an ability to impose the death penalty would reduce significantly the number of states prepared to subscribe to the statute.

However, the minority view, eloquently and forcefully argued, would retain the death penalty in those cases involving the gravest crimes committed in the most cruel manner with total disregard for any standards of humanity.

Method(s) of enforcement of sanctions

The issues raised here would obviously depend on which sanctions would be available. These would not necessarily be limited to imprisonment, and in the case of some (e.g. forfeiture of assets or of the proceeds of crime) existing or developing international systems of mutual assistance might be able to be modified for use. But merely financial sanctions would not be appropriate for most of the crimes which would be involved (especially war crimes), and the discussion accordingly focused on enforcement by way of imprisonment.

It was clear that an international criminal tribunal or court would face potentially enormous difficulties in the enforcement of sentences of imprisonment. These included: the expense of long-term imprisonment, in particular if a special facility was required; the security problems of detention of perhaps very high-profile prisoners; the desirability (if only for humanitarian reasons) for prisoners to be housed close to their home territory; the possibility that a prisoner might be regarded either as a hero or a monster by the local population, and in the former case that any local prison facility would be seen as a quasi-colonial imposition; the likely unwillingness of third states to house large numbers of long-term prisoners even though the costs of doing so might be borne internationally; the question of compliance with minimum standards for the treatment of prisoners, especially given the variation in economic and social conditions in different parts of the world; need for rules relating to such matters as conditions of imprisonment and prison discipline, and the related issues of parole, probation, pardon and release on compassionate grounds. It was also noted that the prospect of an *ad hoc* tribunal being implemented for a given conflict while that conflict was still raging raised its own special considerations.

The limited international experience with these issues was not a happy one. Although it was recognized that even small and poor states maintained effective prison systems, and that the United Nations's minimum standards and rules for detention had been drafted to apply to a wide range of situations, the additional problems of imprisoning war criminals and other persons convicted of international crimes made this an especially difficult area. Indeed the difficulties were such that some felt they were almost insuperable, at least for a long-term court, and required reconsideration of what such a court was really intended to achieve. Others were more optimistic that the problems could be resolved, if necessary on a base by case basis. But there was general agreement that without a solution, the arguments for having a criminal court trying individual persons would dissolve. And it would not be possible to proceed to trial in any given case unless arrangements for implementation of an eventual sentence were in hand.

The first issue to be resolved was whether the sanctions systems would be essentially international or whether national systems could be co-opted, and if so on what basis and under what safeguards.

An *ad hoc* tribunal such as that envisaged for the territory of the former Yugoslavia was essentially an imposition by the international community of a system of trial for serious offences, in a situation where local courts were not operating or could not be expected to operate. In such a case it was likely that the system of sanctions would also have to be internationally imposed, although there might still be some delegation of the actual implementation of sentences to national systems, whether within or outside the territory of former Yugoslavia. The essential point was that a specific political decision would have been taken, at a high level, to proceed with the

tribunal, and this would tend to guarantee that resources would be available to ensure that the decisions of the tribunal were enforced.

By contrast, a permanent international criminal court might have no such assurance in a given case. In a single situation (such as that arising from the Lockerbie bombing) where the jurisdiction of the court was established under the principle of ceded jurisdiction, it could be argued that the state ceding jurisdiction could be expected, or even required, to give effect to any eventual sentence. Indeed a state might agree to cede jurisdiction only on this basis. This raised the issue of other states concerned, which might be dissatisfied with this and might therefore oppose the exercise of jurisdiction. This problem has already arisen with the extradite or try obligation under various conventions. It might have to be resolved between the interested parties prior to the cession of jurisdiction. Alternatively the court could be given a discretion to decide where its sentence was to be carried out, as between states willing to do so, but with the ceding state having a residual responsibility in the absence of any other solution.

Given the uncertainty of when and to what extent a permanent court would be called to exercise jurisdiction it was impossible to establish an international machinery of sanctions. It would be necessary to rely on national facilities, subject to some level of international scrutiny and supervision, as the ILC 1992 Report had concluded. The various solutions suggested in the CSCE, French and Italian Reports and in the Bassiouni draft were canvassed, but there were difficulties for every solution. Although there was support for a rather flexible, *ad hoc* approach, others favoured a system in which preference would be given to imprisonment by the state of the accused's nationality, in any case where the consent of that state was a prerequisite to the jurisdiction of the court, and alternatively by the ceding state, unless other interested states object to the latter, in which case the court should have the discretion adverted to above.

The point was made that a very small state or a state traumatized by recent conflict might be practically or politically unable to implement the penalty itself, and that any system had to be flexible enough to cope with such cases.

Turning to the conditions of implementation of sentences, it was stressed that issues of pardon, parole etc. had to be solved. Justice was not justice without the possibility of mercy. Although the parameters of any sentence would be fixed by the international tribunal or court, there seemed to be no alternative to the application of the law of the enforcing state in terms of detailed issues of implementation. This was especially true in the case of a permanent court. At the level of pardon, parole etc., it might be possible for the court to play a role, at least of an advisory character, similar to that provided for in the law of some states. In the case of the *ad hoc* tribunal, a more international system might be envisaged: the CSCE Report, for example, envisaged an international parole board. But lengthy sentences might be involved, making the existence of standing international machinery, as distinct

from the use of national machinery subject to international standards and supervision, impractical even in the case of an *ad hoc* tribunal.

In conclusion it was recognized that not all problems could be solved immediately, and that interdisciplinary expertise and political decisions on the availability of resources would be a necessary part of the equation. What was necessary was to identify the range of issues requiring to be addressed, and eventually to be clear about how they were to be addressed.

CHAIRMAN'S CONCLUSIONS

The initial purpose of the International Meeting of Experts on the Establishment of an International Criminal Tribunal had been to bring together domestic experts in criminal law and the administration of criminal justice with experts in public international law and members of the International Law Commission to consider the Commission's report of the work of its forty-fourth session. That initial purpose was modified to include a discussion of Security Council resolution 808, which calls for the establishment of an international tribunal for the prosecution of individuals responsible for grave breaches of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

As a result, the meeting examined a number of legal, policy and organizational issues in both contexts. The prevailing view was that although the experience of the creation and operations of the proposed tribunal for the former Yugoslavia would provide invaluable lessons for the creation and operation of the permanent criminal court, there would be enough differences between the two that the former should not be viewed as a precedent for the latter. Similarly, the present urgency to establish a tribunal for the former Yugoslavia should in no way deflect the international community from the important task of establishing a permanent court to ensure that similar challenges can be responded to quickly and firmly in the future.

The meeting reflected an appreciation of being at the threshold of an emerging legal order under which individuals who violated certain fundamental universal values could be held to account not only before national tribunals but also before the global community acting through an international tribunal. During the meeting many aspects of this emerging legal order, both its substance and its form, became clear. This report records that process.

In attempting to confront the immediate challenge posed by the events in the territory of the former Yugoslavia, the meeting recognized that justice is a very real human need. Injustice ignored breeds continuing injustice. Only through a determination to bring to justice those individuals who commit or order atrocities can the world community hope to break the cycles of war, death and misery in which one generation's atrocities become the genesis of those of the future. To ensure that justice is done, the international community must create conditions in

which victims of the present atrocities in the former Yugoslavia, especially the policies of "ethnic cleansing" and systematic rape, can come forward in safety.

The mere creation of appropriate institutions, however, is clearly not enough. Adequate human and financial resources must be provided in order to ensure that international criminal tribunals, whether temporary or permanent, can realize their purpose. As well, accountability mechanisms have to be put in place to ensure that they do so in the most effective, efficient, and humane manner possible.

Although many of the issues relating to the establishment of an international criminal tribunal are complex and novel, they are by no means unresolvable given a willingness to do so. The discussion at the meeting suggested that there now exists sufficient agreement on a legal, policy and institutional framework to provide a basis for the immediate creation of a tribunal for the former Yugoslavia and to successfully continue on an urgent basis with the International Law Commission's work toward the creation of a permanent international criminal court.

The meeting ended as it began with an appreciation of a fundamental moral vision in which the world community is being called upon to establish institutions and mechanisms to allow, if indeed not oblige us, to confront those aspects of human behaviour which would fundamentally deny the value and meaning of human life and dignity. If we are to live in community, there must be a shared recognition that justice must be done and that it is our shared responsibility to ensure that it is.

The International Centre for Criminal Law Reform and Criminal Justice Policy is pleased to have been of service to the international community on this occasion.